THE PROBLEM OF REFORMING JUDICIAL ADMINISTRATION IN AMERICA.*

IV. The Problem of Reforming the Bar.

BY NO means the least important subdivision of the problem of reforming judicial administration in America is the reorganization of the American Bar. The fact that the courts cannot administer justice with the highest efficiency unless all the functionaries of the court are carefully selected and carefully trained is beginning to be realized. But we Americans seem to have overlooked the additional fact that be the judges ever so competent and the clerks and subordinates ever so well trained and under control of the courts, without the coöperation of a competent Bar, the soundness of judicial decisions and the speed with which judicial business is dispatched can never reach a high degree of excellence.

It is perhaps not going too far to say that Americans have lost sight of the most important use for a Bar. The public mind, apparently swept away by the provision in the state constitutions that no persons shall be elected or chosen as judges unless they are learned in the law, must have become possessed of the idea that judges can know the law to the utmost detail and decide properly litigated issues without assistance from the lawyers who appear before them. Indeed, instead of regarding the Bar as instructors and friends of the courts, the Bar have come to be accepted as rather fulfilling their function when inducing the courts to overreach the limits of precedent in favor of the litigants on the one side or on the other. This conception is no doubt another outgrowth of the exaggerated American idea that the client, especially in criminal causes, is entitled to claim every rule of the contest which looks to his favor. But whatever its historical origin, it has generated in the mind of the judge a consciousness that he cannot trust to the ingenuous-

*Editorial Note: For former articles of the same series by the author, see 1 Va. Law Rev. 297; 3 Va. Law Rev. 1; 3 Va. Law Rev. 598.

ness of the pleadings and arguments of counsel, and probably has become the cause of as much error and delay in the administration of justice as uncertainty in the law or technicalities in the procedure.

The ideal trial of a cause of action, in so far as its presentation for judicial decision is concerned, is attained only when thoroughly informed and experienced counsel present the arguments in support of their respective sides, especially as to the law involved, without undue exaggeration of their importance, and without the slightest deception as to their bearing. Under such circumstances the case is rare, either in the *nisi prius* courts or on appeal, which cannot be decided rightly from the bench, certainly when the judge carefully compares the two positions and induces proper elaboration of the arguments by interrogation.

It is unlikely that such ideal trials are now often seen in America, or even that they were the rule in the days when the courts were less pressed with business and the contact between the American Bench and Bar was closer than it can possibly be now. But that it has been attained in England is evident from the custom of the English judges of delivering their opinions immediately at the close of the arguments. Indeed, in England a postponement of the decision is the exception. And it is said that Sir George Jessel, Master of the Rolls and first head of the Court of Appeals created under the Judicature Act of 1873, during all his career as judge, never failed to pronounce his decision at the end of the arguments, except in two cases of extraordinary importance, and then he reserved his decision out of deference to his colleagues and not from his own inability to reach an immediate decision.[1]

But, without an extended education of public opinion, of course it will be impossible to establish generally in America this ideal relation between the judge on the Bench and the lawyer at the Bar. And while it must be one of the ultimate aims of reformers, it is not the immediate aim which the reformers among the Bar should now undertake. They must first undertake to restore the general recognition and observance of the

[1] See "Jessel," 15 ENC. BRITT., 11 ed., 336.

duty of the Bar to the public to act as guardians of justice, leaving to later development the recognition of their full duty to the Bench. And if, in discussing the duty of the profession to the public, it becomes apparent that the lawyer's duty to the public and his duty to the court are inseparably connected and that the codes of legal ethics are not inconsistent in uniting them as they do, it will be unnecessary to go further and prove that the full recognition of a barrister's relation to the Bench must eventually come.

To charge a lawyer with a duty to the public to act as a guardian of abstract justice may be considered by some an abandonment of the commonly accepted chief purpose of the profession, which is the furtherance of the interests of his clients; and, indeed, if a lawyer can rightfully assume an obligation to his client as broad as the interest of his client, sometimes a lawyer's duty to the public will be found in conflict with such an estimate of his contractual obligation. But, in truth, the lawyer's duty to the public merely fixes the limit of his duty to his client, and cannot be in conflict with it; and it is largely due to the general refusal of clients to recognize any limitation upon their lawyer's duty to them that we are confronted with the necessity of reforming the American Bar today.

The duty of the lawyer to the public is the duty not to procure for his client, in court or out of court, more than the client's due under the established principles of law and the circumstances of his particular case; and, in the absence of legal definition of such rights, no more than the laws of morality will admit. And the relation by way of limitation which this duty of a lawyer to the public bears to his duty to his client is apparent when we say that it is a lawyer's duty to his client to strive to secure for him the full quota of his due under the established principles of positive law, and where those principles are not conclusively established, then to be guided by the established principles of morality.

However startling these positions may be in the above didactic form, the limitation they set upon a lawyer's duty to his clients must be accepted if the following premises are sound. The relation of a lawyer to his client is one of the so-called fi-

duciary relations, that is to say, it requires at many times unguarded trust to be reposed by the client as a principal in the lawyer as his agent; and those occasions are by no means limited to instances of insane or ignorant clients or clients of tender years. For the speedy administration of justice it is necessary for the lawyers to have almost unlimited authority over causes of action in process of judicial determination, and it is impracticable for each lawyer to advise with his client upon all the exigencies that may arise either antecedent to the trial or during its course. Being, therefore, in the power of his lawyer, the client's trust is unprotected and absolute.

But, as a fiduciary institution, the value of the profession to society must be proportionate to the trustworthiness of the profession; for if the lawyers are not trustworthy, prudent men will often prefer to settle their disputes at great sacrifice rather than put any trust in the profession whatever.

Now it may be admitted that the strongest instinct of mankind in general is that which impels us in the direction of our own interest; since the temptations of excessive selfishness are the perils against which most of the positive laws are directed. Therefore, the essential principle of trustworthiness in any individual character is the possession of such self-control as not to give way to the natural instinct of selfishness, even under the circumstances uncontrolled by the restraints of positive law.

But, to control and direct one's own instinct for selfishness, one must act in conformity with some system of rules of morals which will enable him to reach a conclusion without waiting to demonstrate its correctness by individual experience. And every system of rules of morals must be applicable to our actions toward all men alike. Otherwise there would be no criterion but one's own will to determine when it should be applied and when it should not.

Therefore, to be entirely trustworthy a fiduciary when acting for his client is no more justified in diregarding his system of morals with respect to the interests of others than he would be in giving way to excessive selfishness when acting for himself; and this involves the limitation upon his professional obligation which we set out to prove. The point may be put more

simply by saying that unless a client can feel assured that the lawyer is applying the same code of morals to his actions toward all persons without regard to his relation toward them, the client can never know what limitations the lawyer is putting upon his conduct toward the client himself.

It is instructive to note how often the canons of social order conform to the conclusions of logical reasoning, although the canons may have been framed from observance of custom rather than by the guidance of mental processes. And it is this underlying soundness of most customs which makes it dangerous to abolish them by force of legislation. Perhaps no modern historian demonstrates this truth to us, as revealed in the everyday relations of life, so fully as Buckle;[2] but if possible even more frequent examples may be seen in the history of law, no doubt for the reason that the field of law is but a collection of crystallized customs.

We should not be surprised to find, therefore, that history has charged the profession of a barrister with the duty to protect, as well as with the duty to advocate, justice. And this is revealed by the books. Thus Thomas, in one of his notes to Coke on Littleton, says that all causes which barristers may be called upon to defend or prosecute fall into three distinct classes, for each of which he assigns definite limits to a barrister's legitimate activities. Causes, he says, "are manifestly just, notoriously unjust, or of a doubtful nature. The rule with regard to the first class is to defend them by just and fair means only. As to causes of the second class, as it is culpable in the parties to prosecute them, it is of course more so in the advocate to support them." While causes of a doubtful nature, "whether the doubt arise from an uncertainty of the fact or law, may be conscientiously defended by the means which are proper for the defense of a just cause."[3]

By the Statute of Westminster I,[4] deceit or collusion in a counsel was punishable by imprisonment for a year and a day and deprivation of the right to appear as a member of the Bar.[5]

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[2] BUCKLE, HIST. CIVILIZATION ENG.

[3] 3 Thomas, Coke, p. 324, note c.

[4] 3 Edw. I, Chap. 28.

[5] 3 BLACKSTONE, COM. 29.

And to better protect him from the temptation of an immediate interest in the cause, custom followed the habits of the Roman senators and deprived the English barrister or sergeant from enforcing against his client any agreement for fees: his services were rewarded by a gift or honorarium in recognition of his presumed merely personal kindness.[6]

Nor have the declared ideals of the American lawyers been less logical in defining their duty to abstract justice. The code of ethics adopted by the Alabama State Bar Association, the first code adopted by an organized Bar in America, prescribed:

> "An attorney 'owes entire devotion to the interests of his client * * * ' to the end that nothing may be taken or withheld from him, save by rules of law legally applied * * *. Nevertheless, it is steadfastly to be borne in mind that the great trust is to be performed within and not without the bounds of the law which creates it. The attorney's office does not * * * loosen the duty of obedience to law, and the obligation to his neighbor." [7]

And the now generally recognized code of ethics of the American Bar Association declares a lawyer to be "an officer of the law, charged with the duty of aiding in the administration of justice." [8]

It is not practicable in the limited space of one magazine article to trace the full history of the recognition by the Bar of the necessity of their semi-judicial attitude toward the public. Indeed, their acceptance of it, so far as the English and American Bars are concerned, is due rather to adoption than to mental conviction. Its real historical origin, like that of many more of our legal institutions than we realize, seems to be traceable to the law and customs of Rome.

The early English lawyers—the lawyers of Henry II and the Edwards—while they organized themselves into a class early

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[6] *Ibid.* This limitation did not apply to attorneys, however, who prepared the causes for court.

[7] The Code of Ethics of the Alabama State Bar Association was drafted by a committee of the Association and adopted Dec. 14, 1887. It appears to be the first code of ethics ever adopted by any body of lawyers.

[8] 22nd Canon of Ethics of the American Bar Association. The Code was adopted in 1908.

enough to take away possession of the court from the control of the church,[9] seem to have gotten all their scientific professional training from contact with the ecclesiastics trained in Roman law in force in the church courts. Suffice it to say, then, that the conception of a lawyer's duties was absorbed by the early English lawyers rather than developed, and that it is traceable directly to the ancient Roman Senate.

The Roman senators were originally patricians, and as such controlled the administration of justice in the Roman polity. To take fees from clients and retainers would have been impossible; first, because their clients were in a sense their own slaves or dependents, and secondly, because the senators themselves were at first both the sole advocates and the administrators of justice in the Roman State.[10] So that their patronage was due rather to their governmental position than to a conception of professional obligation.

The history of the practice of law throughout the Roman Republic and the Empire could well be the subject of a book itself; but a cast of the eye upon it is enough to learn that the position of the lawyer may be traced back to the judicial function itself, and presents but another instance of social history conforming to the principles of logical necessity.

And that brings us to the investigation of how far the Bar are now conforming to those historical and necessary standards; and if they are drifting away from them, what are the causes? and what is the remedy? since without them our administration of justice must deteriorate.

About thirty years ago, Mr. James Bryce (now Viscount Bryce), in his almost universally approved survey of American society,[11] said:

> "The legal profession has in every country, apart from its relation to politics, very important functions to discharge in connection with the administration of justice * * *. Does the profession in the United States rise to the height of these

[9] "Five Ages of the Bench and Bar," by John Maxey Zane, 1 SELECT ESSAYS, ANGLO-AM. LEG. HIST. 646.

[10] *Cf.* 5 FERRERO, GREATNESS AND DECLINE OF ROME, p. 167; "Patron and Client," 20 ENC. BRITT., 11 ed. 935.

[11] 2 BRYCE, AM. COMM., p. 507.

functions, and in maintaining its own tone, help to maintain the tone of the community, especially of the mercantile community, which, under the pressure of competition, seldom observes a higher moral standard than that which the law exacts? So far as my limited opportunities for observation enable me to answer this question, I should answer it by saying that the profession, taken as a whole, seems to stand on a level with the profession, also taken as a whole, in England. But I am bound to add that some judicious American observers hold that the last thirty years have witnessed a certain decadence in the Bar of the greater cities. They say that the growth of enormously rich and powerful corporations, willing to pay vast sums for questionable services, has seduced the virtue of some counsel whose eminence makes their example important, and that in a few states the degradation of the Bench has led to secret understandings between judges and counsel for the perversion of justice. Whether these alarms be well founded, I cannot tell. It is only in a few cases that the conditions which give rise to them exist."

In 1902, Mr. W. J. Ghent, in a widely read study of the trust-forming period of American society of that day, which he called a "Benevolent Feudalism," said:[12]

"From the judgeship to attorneyship of a great corporation has recently become a common promotion. The number of ex-judges who have been thus translated to higher sees is notable: one finds or hears of them in many places. Republics may be ungrateful, as the adage runs, but not so the magnates. The gratitude of the latter may not be wholly platonic; it includes, no doubt, a lively sense of favors to come. But whether prospective or retrospective, it expresses itself in deeds of recompense, and that is the main test."

Present conditions of the practice in New York can be understood very well from certain remarks made by Mr. F. M. Danaher, speaking before the Educational Section of the American Bar Association in 1911. He is reported as saying:[13]

"Conditions at the Bar in New York, more especially in New York City, are lamentable. There are upwards of a thou-

[12] GHENT, OUR BENEVOLENT FEUDALISM, p. 121.

[13] REP. AM. BAR ASS'N, 1911, p. 645.

> sand admissions thereto yearly, and the competitive struggle for existence thereat, as a matter of direct result, has tended to lower the morals of the profession and to foster unprofessional conduct. It is certain to a demonstration that morality at the Bar is in direct proportion to its prosperity, and that when there are too many lawyers for all to make an honest living, some must and will be dishonest. * * * We are beginning to realize that high educational requirements and stiff Bar examinations do not keep down the increasing number who enter the profession, and we are beginning to know that the only way to restore the ancient prestige of the law, to make it more moral and an ethical force in the administration of justice, is to adopt some of the requirements of time and cost and special training necessary for admission to the Bar in European countries."

So in 1913, the Central Council of the Alabama State Bar Association, charged by statute with the duty of instituting prosecutions for disbarment in proper cases, in making their yearly report to the Association, said: [14]

> "We are somewhat at a loss to determine exactly how far we should go in prosecuting for disbarment attorneys accused of unethical methods of getting practice, especially as it is generally known that the standards of American ethics are much lower in that respect than they were twenty-five years ago. * * * And it has seemed almost absurd to attempt to publish as a stray case what all lawyers know to be a daily occurrence."

These quotations, in connection with the rumors of scandals which the public of almost every city have heard traced to the office door of more than one well-known member of the local Bar, are enough to prove that the profession is no longer maintaining, or at least enforcing, the high standards of professional morality which disinterested society desires.

Fortunately, however, it cannot be said as yet that society no longer expects their standards to be high. Every lawyer of ten years or more practice has had the experience of business men

[14] 36 REP. ALA. ST. BAR ASS'N 94. That report was written by the author of this article, who has been, since 1910, Chairman of that Committee of the Association.

bringing him causes along with complaints that this or that fellow practitioner has taken advantage of his ignorance or trust in a lawyer's professional fidelity; and the complaint is always coupled with the taunt that the profession should not allow such delinquencies to go unpunished.

But while such an expectation on the part of the public that the Bar should keep itself pure, is the most valuable remaining basis upon which to begin professional reform, it reveals the most discouraging feature of the situation—the utter lack of realization by the public of their own responsibility for the present condition.

It is believed impossible to restore the Bar to the highest position in the public confidence, and to maintain those standards of professional conduct toward the administration of justice which we have seen are unavoidably necessary, without material assistance from the public and many radical changes in the laws affecting the admission to the practice of the profession. This will become clear if we look for the causes which have tended to lower the Bar's ethical standards; and these causes are by no means difficult to identify.

Putting aside as too varied for careful attention in this article all the smaller demoralizing influences which lower the standards of the Bar—such as the system of collecting agencies which have come into vogue with merchants and manufactures all over the country, the evil features of the federal bankruptcy law, which puts the premium of a large fee upon unprofessional methods of collecting business, and the apparently unavoidable system of the public service corporations for settling personal injury claims through claim agents in states which have not yet adopted a workmen's compensation law—we have left two great explanations for the lowering of standards of the legal profession, both of which have been noted in the above quotations. First, as foreseen by Lord Bryce when he wrote his "American Commonwealth" thirty years ago, the enormous increase of wealth in America has overturned all the old standards of American society, and has given success in commercial and manufacturing enterprises such preëminent recognition as holding the top rung of the social ladder, that merely intellectual occupations

if unattended by opportunity to earn and amass considerable fortunes are no longer respected as giving those who pursue them high place in the community.

This shifting of the social strata began in the northern states immediately after the Civil War, and gradually worked its way over the South and West, even through the agricultural districts; and when fifteen years ago the advent of collossal corporations made their administration the dominant factor in every locality, and the members of the Bar whom they employed patently occupied subordinate positions in the corporate oligarchies, although receiving better pay for their services than the other lawyers in the locality, of course the position of the Bar in society became irretrievably reduced accordingly.

The other important factor in bringing about the present critical condition of professional legal standards is the enormous increase in the number of lawyers in America.

The United States Census Reports for 1870 show that there were then 40,736 lawyers and judges in the United States, with a total population of about 40,000,000, making a lawyer to every 977 persons. The Census Reports for 1880 show that there were then 64,137 lawyers and judges in the United States, with a total population of about 50,000,000, making a lawyer to every 782 persons. The Census Reports for 1890 show that there were then 89,630 lawyers and judges in the United States, with a total population of about 63,000,000, making a lawyer to every 704 persons. The Census Reports for 1900 show that there were then 114,460 lawyers and judges in the continental United States with a total population of about 76,000,000, making a laywer to every 676 persons.

The Census Reports for 1910 showed an encouraging falling off in the number of lawyers, giving one lawyer only to every 754 of the 92,000,000 of population; but a careful estimate of the number of lawyers given in Martindale's directory of lawyers in the continental United States in 1916, compared with the present estimated population of 100,000,000, makes the number of lawyers on the increase again.

Of course it is true that the total volume of business in the United States has increased enormously *per capita* since 1870;

so that it may be argued that the increased proportion of law business must have kept pace with the increase in lawyers. But it will hardly be contended that the average American lawyer today is making as good an income as the lawyer of 1870—certainly not, if we consider its buying power. It is estimated, for instance, that the average annual compensation of a New York lawyer is now only $1,000;[15] and probably no one supposes that the average annual compensation of the provincial lawyers throughout the country is any greater. While the average income of a New York lawyer of 1870 seems not to have been made, the buying power of a dollar was much larger in 1870 than now, and we do not find historical evidence of such economic pressure for business in New York in the Seventies as exists among the profession there today.

No: the great increase in American business has enabled certain fortunate and well-known metropolitan lawyers to obtain remarkably large fees for their services, aggregating enormous incomes from their profession. And it is these conspicuous successes, together with an uncertain remaining admiration on the part of the lower and middle classes for living by one's head instead of by one's hands, which has led so many young Americans to the Bar, rather than an increased demand for their services.

Thus, while the economic expansion of the country has lifted the manufacturing and merchant magnates into the highest places in society and reduced the influences of the professional classes, so that class-pride can no longer operate to uphold the ideals of the Bar, the same economic expansion has lifted the ambitious element in the lower classes and led them to crowd into the professions in unprecedented numbers, rendering even more difficult the maintenance of the ideals of the Bar by the creation of more lawyers than the business demands.

It may well be that in time the surplus numbers will withdraw; but they will hardly do so before the social standard of the Bar shall have been even further reduced, and the profes-

[15] Statement of Frank Sullivan Smith, Esq., of New York, speaking before the Section of Legal Education of the American Bar Association, in 1912. REP. AM. BAR ASS'N, 1912, p. 726.

sional standards shall have been almost destroyed. But the social revolution has already been accomplished; and, as we shall see later, it is impossible to reduce the numbers to any material extent by directly removing from the Bar such as are morally unworthy to stay in. So we may safely conclude that the most practical plan to remedy the situation is to reduce the inflow; and the most effective way to do that is by dilatory laws, designed with the view of throwing obstacles in the way of those who desire to get in.

During the last twenty years the public came to appreciate the unwisdom of its former policy of allowing anyone to practise law without first acquiring a more or less systematized knowledge of the *corpus juris* itself. So most of the states have now passed laws providing quite rigorous entrance examinations for applicants for the Bar. Of course, that is all very well, as far as it goes; but we are beginning now to see, as Mr. Danaher said in the language above quoted, that we need much more than that. If we had adopted in America fifty years ago the French requirement of a university degree and three years of probationary study and practice in a practising lawyer's office before the applicant can be admitted to the Bar to practise on his own responsibility, the American Bar would be on a much sounder basis than it is today.

They have already established substantial restrictions in New York. Since 1911 no one is allowed even to take the examination for admission to the New York Bar unless he has first obtained a diploma from a law school requiring full three years' study, or has pursued four years' systematic study of the law outside a law school, including at least one year as a clerk in an established law office.[16] But this seems to be proving insufficient to reduce the Bar to adequate size, so they realize that more restrictions are necessary.[17]

It is true that no definite course of study has ever been required for admission to the Bar in England; and yet they have not materially suffered from an overcrowded Bar. But admission to their Bar is absolutely in control of the Bar itself, it be-

[16] See REP. AM. BAR ASS'N, 1911, p. 646; *Id.*, 1912, p. 724.

[17] *Ibid.*

ing necessary for every prospective candidate to be admitted to one of the five Inns of Court, from which, after about three years of desultory attendance, he may stand an examination and be called to the Bar. And it must also be remembered that the English Bar has entrenched itself behind so many social barriers thrown up during its seven or eight hundred years of history that their position has not yet suffered as it would have suffered if English society had been strictly republican like ours.

> "As soon as the battle between the State and the Church of Rome, beginning with Henry II, led to the clergy being prohibited by the Pope from studying the English Common Law, English lawyers grew up who soon took possession of the courts; and necessitated the selection of the judges exclusively from the common law bar. British common sense also directed the organization of students of the common law into segregated groups apart from the popish environs of the universities.
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> As a defense against inroads from the universities and the church, it became the rule, and later a fetish with the English lawyers, to know nothing about the learning of the law of Rome. As a defense against the inroads of the masses the law student societies clustered in the inns of court stipulated courses of study for admission to the bar, and by creating an expensive standard of living at the inns, substantially restricted their memberhip to the wealthy nobility. As a result of exclusiveness came prerogative; and by exclusiveness and prerogative there naturally arose great pride in the profession.
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> Nor have the British monarchs been unminded of their duty to assist in maintaining the prestige of the bar. The most frequently traversed path to a peerage has been through success at the bar." [18]

Let us realize, then, that the American Bar can be reformed only if the public are willing to allow a great restriction of its numbers; that a full three years' law course in an established school must be required, and moreover, the course must be one which requires all the student's time: that this course must be supplemented by at least one year in the office of a practising

[18] The above is taken from the report of the Central Council to the Alabama State Bar Association, in 1916. 39 REP. ALA. ST. BAR ASS'N, p. 27. The report was written by the author of this article.

lawyer, or in attendance upon the sittings of a court, and that this novitiate must be supported by a reputation for good character which the examining committee shall approve, before the applicant shall be allowed to prove his legal knowledge by standing the usual examination.

In presenting these recommendations for the material reduction in the number of American lawyers in the next generation, it is realized that the policy which they involve is revolutionary after the hundred years of welcome-all policy which has brought the American Bar to the present demoralized state. It is realized that the very class of the public who today harrangue against the low standards of the profession will be the last to acquiesce in its reëstablishment upon a basis on which high standards can be maintained. But a frank examination of the situation and a comparison of the history of the American and English Bars must lead to the conclusion that, without creating revolutionary restrictions to admission to the Bar, no plan for remedying the present condition will be of any practical value. Without such restrictions, the special codes of ethics of the Bar should be abolished; and the entire profession should be turned loose to obtain and conduct business as it will, unhampered by any rules of conduct beyond those binding upon all members of the public at large. As the situation now is, the timid or uneducated litigant, who is likely to choose his counsel from those who ask for his case, is often practically precluded from making a selection among the highest class of the profession.

Of course, the American public do not realize the inevitability of the present condition from the policy toward the Bar which America has so long pursued; and it is therefore very important to fully demonstrate the soundness of our conclusions. We have so far compared the American policy with that of no other modern nation but England. Before disposing of the subject let us look to other countries than England, to find if any have been satisfied, as we have been satisfied in America, to let the legal profession expand at any man's will.

Cursory reference has already been made to the three years of probation required of a candidate for the Bar in France, preceded by the acquisition of a university degree. Let the

supporter of the welcome-all policy recall that his democratic ideas were tried by the French during their revolutionary period, when the National Convention passed orders abolishing the legal profession,[19] and that in 1822 a law was passed restoring the former privileges of the Order of Barristers.[20] The privileges include not merely the sole right to call to the Bar, but the duty to supervise the novice during his entire three years probationary period in the office of one of their number. Moreover, in France the university degree taken by the probationer (who is designated a "licentiate") must have been one preparing him expressly for his chosen profession;[21] and this presupposes a general education to have been gotten in advance even of that course.[22] Anyone who is unfamiliar with the restrictions upon the practice of law in France, will be much enlightened by tracing the observations of great French lawyers upon the restrictions insisted upon, as well as upon the elaborateness of the preparation required for admission to the French Bar.[23]

In Germany, as would be expected, the requisites for admission to the Bar are no less severe. The applicant must first pursue preparatory study in a German university for three or more years. He then prepares an approved paper on a practical juridical problem, and submits himself to an oral examination before a commission of university professors and judges of the Courts of Appeal. Those barriers successfully overcome, he is enrolled as a *"referendar,"* for four years initiatory training, which are passed as follows: The first nine months he is attached to a local court as as assistant to the judge, among other duties, exercising himself in the drafting of decrees, taking down minutes, and acting as a sort of clerk of court. He then is attached to a higher court for twelve months, where, under the guidance of the judge to whom he is assigned, he passes

[19] *Cf.* paper by Frederick R. Coudert, Esq., REP. AM. BAR ASS'N, 1911, p. 677.

[20] Paper by Paul Fuller, Esq., REP. AM. BAR ASS'N, 1914, p. 904.

[21] Paul Fuller, Esq., *supra.*

[22] Paper by Edward S. Cox-Sinclair, Esq., REP. AM. BAR ASS'N, 1910, p. 821.

[23] Mr. Fuller gives an excellent résumé in the paper referred to.

through all the divisions of the court, until he has become thoroughly familiar with all the work. He then spends four months in the public prosecutor's office, followed by four months more in a barrister's or solicitor's office.[24] He then returns for twelve months to a local court, usually to perform semi-judicial duties; and lastly spends six months attached to the Court of Appeal, where he prepares opinions and performs what appears to be the work of a high order of private secretary to one of the judges. And when this entire course of training has been completed, the *referendar* is subjected to a final state examination in the Ministry of Justice, the passing of which entitles him to become a full member of the Bar.[25]

In Italy, where the distinction between an advocate, or barrister, and an attorney, or solicitor, prevails as in England, the calling of an advocate is protected by measures more strict than in France, although not perhaps so thorough as in Germany. The applicant must have had eight years' schooling as a preliminary to entering an Italian university, and he must present a degree of doctor of law from one of the Italian universities as a preliminary to his practical training. He must then pass two years in the office of a practising barrister, and during the while attend at least a fourth of the sittings of the Court of First Instance and of the Court of Appeal. An examination, both oral and written, administered by a board of judges and selected commissioners, then determines whether his knowledge of legal science and of the practice of the profession is sufficient to warrant his admission to the Bar.[26]

Of the old countries of continental Europe, Spain seems to require less preliminary work than any other which has come under the observation of American investigators. The Spanish advocate must first obtain the degree of doctor of law in a Span-

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[24] In Germany, as with us, there is no division of the profession into barristers and attorneys.

[25] "The Training of a Referendar in Germany," a paper prepared by Dr. Jur. Mechlenburg, and furnished to the Section on Legal Education of the American Bar Association by the courtesy of Count von Bernstorff, late German Ambassador to the United States, REP. AM. BAR ASS'N, 1914, p. 908.

[26] Paper by Edward S. Cox-Sinclair, *supra*.

ish university; but no preparatory work in a law office is necessary to his admission to practice. However, in Spain, as in England, social recognition seems always to have furnished a means of exclusion more effective than legal barriers. A Spanish advocate has long been accorded the position of a nobleman, and seems to be exempt from many duties which fall upon the lower classes of the population.[27]

We would expect the Spanish policy to be followed in the Spanish Colonies in America, and to some extent, it seems to have been done;[28] but in South America today the leading nation is probably Argentina; and there, while the practice of law is classed as a liberal profession, for which preparation seems to be deemed rather a matter of learning than of practical experience—as seems to have been the view in Spain—the period which must be given to its study has been fixed at six years in addition to the instruction acquired in the usual secondary schools.[29] Admission to the Bar is thereafter conditioned only upon the passing of a prescribed examination; but while it might appear wiser to divide the six years of preparation between the university and a barrister's office, undoubtedly from the standpoint of protecting the Bar, the six years of university work presents a greater barrier than the European method of allotting the time.

Coming now nearer home, the requisites for admission to the Bar in the older Canadian provinces of Quebec and Ontario, while not so strict as those we have cited from continental Europe, require a preliminary classical knowledge considerably higher than is acquired from the usual American high school curriculum. Then, in Quebec, a period of four years of actual apprenticeship to a practising barrister is provided; which may be reduced to three years, if during the while the student at-

[27] Paper by Manuel Rodriguez-Serra, Esq., of Porto Rico, REP. AM. BAR ASS'N, 1910, p. 840.

[28] See the rules formerly obtaining in Porto Rico, *ibid.*

[29] The authority for these statements as to the Argentina requirements is a letter to the author in response to his inquiry addressed to Hon. Romulo S. Naon, Ambassador from Argentina to the United States.

tends the law lectures of one of the two local universities.[30] And in Ontario a similar novitiate of five years is required, apparently with the attendance upon law lectures as an additional requirement, unless the candidate has obtained a university degree, either classical or legal, before offering as a candidate for the Bar, in which case the five year novitiate is reduced to three.[31] Moreover, we find again that the Bars of Quebec and Ontario have sole control, as in England and France, of the whole machinery of admission to the practice of the profession, and are therefore responsible to themselves and to the public for the personnel and efficiency of the Bar.

This simple plan of giving the Bar itself control of the portals to the profession has been entirely ignored in the United States,[32] although it might have come as naturally from England to us, as to our Canadian neighbors. And it requires little foresight to see that it would be more potent in limiting the size of the Bar of the next generation than any other one requirement for admission that we could adopt. Of course, as we have already concluded, it is not in itself enough; and hence the English Inns of Court are beginning to provide for the students elaborate law courses, attendance on which they will doubtless soon make a necessary part of their preparation. But the control of admission by the Bar itself, if adopted generally throughout the United States, would bring to bear at once the natural desire in all present practitioners, whatever their own qualifications, that the profession shall not become yet more crowded, and set them to working for the imposition of more extensive preparatory requirements.

This résumé of the laws and customs of other nations should suffice to prove to us that most of the United States have pursued their welcome-all policy directly in the face of practically

[30] Paper by Andrew R. McMaster, Esq., of the Montreal Bar, REP. AM. BAR ASS'N, 1910, p. 829.

[31] Paper by Herbert Harley, Esq., Secretary of the American Judicature Society, on "A Lawyer's Trust."

[32] The author is informed by the President of the Bar Association of one of the Indiana cities that the court there refuses to grant license to practise to any applicant not approved by the local bar association. But the rule is arbitrary; since in Indiana every citizen has a constitutional right to practise law without preliminary examination or study.

all educated opinion; and it would seem safe to conclude from this fact, as well as from the foregoing observations and opinions upon the condition of the Bar in our own country, that the solution of the problem of reforming the American Bar lies rather in reforming our plans of admission than in any redoubled efforts to expel the undesirable elements already inside.

It is easy to declare that the profession must not shirk its historically imposed duty of cleaning up the present Bar. And, of course, we must not repudiate it, however justified we might be in doing so. But, in the first place, it is very difficult to approach from the moral standpoint a problem which is chiefly economic. If there are too many lawyers in America for them all to hope to make an honest living at the profession, it is next to impossible to keep them within the bounds of honesty by the enactment and enforcement of laws; it is even puerile to endeavor to restrict their actions still more closely to conform to the higher ideals of our codes of professional ethics. But, in the second place, if all the associations of the Bar should devote themselves in a campaign of reform to running down and basing prosecutions for disbarment upon all the instances of malfeasance by the profession, the safeguards provided by the law against injustice are such that the number of lawyers expelled would not keep pace with the number of probable future malfactors who, at the present rate of entries, are yearly being ushered in.

Prosecution for disbarment in America is regarded in many jurisdictions as a quasi-criminal proceeding.[33] In many jurisdictions a jury trial may be demanded by statute. In every jurisdiction the systematic procedure of a trial, involving a formal notice and a formal hearing, is necessary to due process of law;[34] and, as an incident to this hearing, it is always possible to obtain a more or less elaborate review. All this means delay, although justifiable delay, as well as the loss of administrative energy on the part of the Bar and the courts. Whereas, on the other hand, before the entrance has been accomplished almost arbitrary restrictions to admission are lawful; since our

[33] The jurisdictions pro and con are summarized in 4 Cyc. 912.

[34] See the discussion in Ex parte Wall, 107 U. S. 265.

courts broadly deny the existence of any absolute right to claim admission as a constitutional privilege.[35]

Moreover, prosecution for disbarment, by its very nature, must be an incomplete solution of the problem. From the difficulty in many instances of establishing the facts involved; from the impracticability of setting bounds to the range of *uberrima fides;* from the sensitiveness of the character of a fiduciary, even to failure of public charges of breach of faith; prosecutions for disbarment must of necessity be of but occasional occurrence. Where the Bar is properly organized, as in England, they are exceedingly rare. There, disbarment is accomplished by action of the benchers of the same organizations of the Bar—the Inns of Court—which are charged with the grant of admission; although the right of appeal is provided to the law courts themselves.[36]

But, of course, the peril of disbarment will always materially repress professional misconduct; and where all the practising lawyers are members of the organized Bar, as is the case in England, France and Canada, there are many corrective measures short of disbarment which may be brought to bear to keep practitioners on guard of their standards. Therefore, as an incident to any plan of reorganization, we in the United States must have a self-governing Bar,[37] and adequate disbarment machinery.

Of course, a thoroughly self-governing Bar is at present impossible of attainment in the United States; since membership in the various associations must be optional with the present lawyers. But if the present Bar associations are put in charge of all future admission, as has been above recommended, so that all hereafter admitted shall *ipso facto* be members of the association which moves for their admission, the next generation of the Bar of each state will be one all-inclusive Bar association, and can govern themselves accordingly.

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[35] A most satisfying and elaborate historical discussion will be found in In re Dorsey, 7 Port. (Ala.) 293 (1838), where a statute was sustained prohibiting any who had engaged in duelling from admission to the Bar.

[36] "Bar," 3 ENC. BRITT., 11 ed., 378.

[37] The need of a self-governing Bar in the United States has been made the subject of an article by Herbert Harley, Esq., Secretary of the American Judicature Society.

But, in the meanwhile, there is no reason why some control over the Bar of each state should not be conferred upon the present state associations. There is no reason why the prime responsibility of procuring disbarments of offending lawyers, even outside the voluntary associations, should not be cast upon these voluntary associations; so that they may throw the weight of state authority into such prosecutions as they find it practicable to undertake. This has been the law in Alabama since 1903; and other states would do well to follow the example. A committee of the Alabama State Bar Association is given authority by law to hear complaints, and upon them, or on their own motion, to file charges of misconduct against any member of the Bar whom they believe to be guilty; and when so filed it becomes the duty of the public prosecutor to press the charges before the courts,[38] as they press other state prosecutions.

Of course, the Alabama law can be helpfully amended. There is no need to present the charges first to the *nisi prius* courts, with the attendant delay of an appeal; since the committee of the Bar Association always affords the accused lawyer a hearing as complete as the *nisi prius* trial. There is no need of allowing the accused to require the charges to be submitted to a jury to establish their truth; since if the right to practise law is not a constitutional privilege, its recall cannot involve the conviction of a crime. And other unwise features might be pointed out. Indeed, several changes have been recommended by the Committee of the Alabama State Bar Association,[39] together with the recommendation that disbarment be determined on trial of a motion by the Committee before a court of appeals, with provision for a reference to verify the Committee's finding on the facts. But all those amendments are matters of detail. The principle of the Alabama law is that which has had nearly fifteen years' trial, giving the Bar Association the power to use the state prosecuting machinery to remove any offending member from the licensed Bar, and the adoption of that principle is a correct step toward the establishment of a self-governing Bar and the scientific reorganization of the legal profession.

BIRMINGHAM, ALA. *Henry Upson Sims.*

[38] Ala. Code, 1907, § 2995, *et seq.*

[39] REP. ALA. ST. BAR ASS'N, 1915.